NO. 81-2170

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM J. HASER,

Petitioner,

v.

JOAN H. WISZOWSKI, Director of Division of Motor Vehicles, State of New Jersey,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

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BRIEF AND APPENDIX IN OPPOSITION

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Counter-Statement of Questions Presented

1. Whether the one-year suspension of driving privileges imposed upon the petitioner by the New Jersey Director of Motor Vehicles because of petitioner's involvement in and responsibility for a motor vehicle accident in which a person was killed was reasonable under the circumstances and not arbitrary or capricious?

2. Whether the delay in bringing this matter to a hearing served to deny petitioner the due process of law to which he is constitutionally entitled?

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NO. 81-2170

IN THE

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OCTOBER TERM, 1981

WILLIAM J. HASER,

Petitioner,

v.

JOAN H. WISKOWSKI, Director of Division of Motor Vehicles, State of New Jersey,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Counter-Statement of the Case

This matter is before the Court on the petition of William J. Haser for a writ of certiorari to the Superior Court of New Jersey, Appellate Division to review the judgment entered by that Court on October 19, 1981 (App. A herein). That judgment affirmed an administrative order of the Director of the New Jersey Division of Motor Vehi-

cles suspending petitioner's driving privileges for a period of one year because of his involvement in and responsibility for an automobile accident in which a person was killed.

The subject automobile accident occurred on November 14, 1978 and resulted from petitioner's operation of a motor vehicle in violation of N.J.S.A. 39:4-98 (failure to drive at an appropriately reduced speed when approaching or negotiating a curve), N.J.S.A. 39:4-82 (failure to drive on the right half of the roadway) and N.J.S.A. 39:4-97 (careless driving). The deceased was a passenger in petitioner's vehicle. The suspension proceedings were initiated by the New Jersey Division of Motor Vehicles pursuant to N.J.S.A. 39:5-30 (App. B herein*) by Notice of Proposed Suspension dated April 27, 1979, following investigation of the subject accident by both State and local police authorities and review of their findings by the Fatal Accident Review Board of the Division of Motor Vehicles (Ra2**). Petitioner requested a hearing in regard to the proposed suspension of his driving privileges and a pre-hearing conference was conducted on August 1, 1979, following which, on March 26, 1980, the matter was transferred to the Office of Administrative Law for purposes of conducting a formal, evidentiary hearing (Aa1 to Aa3, Ra3). By notice dated February 19, 1981, the formal hearing was scheduled for March 6, 1981 (Ra4), but adjourned at petitioner's request until April 24, 1981 (Aa4 to Aa8), when it was heard before Administrative Law Judge Naomi Dower-LaBastille.

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* The statute provided in petitioner's Appendix A is not the provision pursuant to which the instant action was taken, since it expressly governs only accidents ocurring after February 27, 1980.

** "Ra" and "Aa" refer, respectively, to the Appendices attached to the respondent's and the appellant's brief filed in the Superior Court of New Jersey, Appellate Division.

At the hearing, the proofs showed conclusively, and Judge LaBastille so concluded, that petitioner had driven his automobile at such a high rate of speed and with so little care and attention as to totally lose control of it while approaching a curve in a residential area (Aa11 to Aa15*). The car skidded 156 feet, crossing over into the oncoming lane of traffic and then off the roadway completely, thereupon become airborne and finally colliding with a pole with sufficient force to sever the car completely in half and to severely injure three of its four occupants, one fatally.** Following this accident and while awaiting the administrative hearing, moreover, petitioner, who had only been licensed for two months prior to the accident, was involved in yet another accident and was convicted of yet another traffic violation (obstructing traffic in violation of N.J.S.A. 39:4-67) (Aa14).

In his defense, petitioner, although never actually conceding that the subject accident was his fault, objected essentially only to the timing of the hearing—his position being that the hearing was so distant in time from the happening of the accident as to represent a denial of procedural due process, relying upon *In re Arndt*, 67 N.J. 432 (1975) (App. C, p. A4 of the Petition). Additionally, petitioner sought to convince the Administrative Law Judge to recommend a reduction of the eighteen-month period of suspension proposed by the Director based upon his assertions that he had voluntarily chosen not to drive for a

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* This portion of the Initial Decision of the Administrative Law Judge was omitted from petitioner's Appendix C. Hence, it was necessary to cite to the Appendix attached to petitioner's brief filed with the Superior Court, Appellate Division.

** Indeed, prior to the hearing, petitioner was convicted in Municipal Court of reckless driving in connection with this accident (Ra16 to Ra17).

period of one year immediately following the accident, that he was presently employed in two jobs in which an ability to drive was important and that he had, since the accident, successfully completed a driver improvement program (in fulfillment of the Municipal Court sentencing order following his conviction for reckless driving) (Aa13).

In rejecting petitioner's due process argument, the Administrative Law Judge noted that the delay in bringing this matter to hearing resulted from no dereliction of administrative duty similar to that highlighted in the *Arndt* case,* that the suspension action in *Arndt* was undertaken pursuant to a completely different statute than was involved here and, lastly, that petiitoner was in no way prejudiced by the delay (App. C, p. A5 of the Petitioner). Finding the evidence sufficient to support the charges and citing appellant's two jobs and his completion of a good driving course as mitigating circumstances, the Judge recommended that petitioner's driving privileges be suspended, but for only one year (App. C, p. A6 of the Petition). The Director, in his Memorandum Decision dated June 22, 1981 (Ra1), agreed and issued the appropriate Order of Suspension (Aa20).

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* With the passage of N.J.S.A. 39:5-30(b) (L. 1979, c. 463, Section 2), effective February 27, 1980 (App. A of the Petition) the New Jersey Legislature declared that a certain class of suspension actions based upon involvement in a fatal accident must thereafter be promptly instituted and adjudicated. The instant action, however, having occurred prior to the effective date of this amendment, was not only not governed by its provision, but, because of the immediacy attached to those fatal accident cases which were so governed, had to be given less of a priority as a result thereof. Thus, *all* hearings on fatal accidents occurring prior to the effective date of this amendment, including this one, had to be delayed pending expansion of the State's capacity to deal with them, in order that those mandated by this amendment to be immediately heard were, in fact, so heard.

Petitioner appealed the Director's decision to the Superior Court of New Jersey, Appellate Division, which, in a one paragraph per curiam opinion (App. A herein), affirmed "substantially for the reasons set forth in the Initial Decision of the Administrative Law Judge dated May 11, 1981." On or about November 17, 1981, petitioner filed with the Supreme Court of New Jersey a Petition for Certification to the Superior Court, Appellate Division to review its Decision. By order entered January 25, 1982, the Supreme Court of New Jersey denied the Petition (App. A of Petition).

On April 15, 1982, petitioner filed the within Petition for a Writ of Certiorari, notification of the Docketing of which was received by respondent on June 14, 1982.

ARGUMENT

The petition for a writ of certiorari should be denied because the decision of the New Jersey Superior Court, Appellate Division, does not present an important question of federal law which should be settled by this Court and because the Superior Court, Appellate Division correctly determined that the suspension imposed by the Director of Motor Vehicles was neither arbitrary nor capricious and that the delay in bringing the matter to hearing did not deny due process.

The rules of this Court governing review on writ of certiorari make plain that review will be granted only "when there are special and important reasons therefor." Sup.Ct. R. 17.1. In this case, the Superior Court of New Jersey, Appellate Division affirmed the decision of the Director of the New Jersey Division of Motor Vehicles to suspend the driving privilege of the petitioner for a period of one year

because of his involvement in and responsibility for a fatal automobile accident. In so doing, the Court determined that the one-year suspension was neither arbitrary nor capricious under the circumstances and that the delay in bringing the matter to hearing did not deny the petitioner the due process of law to which he is constitutionally entitled. Finding no special reasons requiring certification of this judgment, the Supreme Court of New Jersey declined to review same.

Notwithstanding the petitioner's arguments to the contrary, the decision of the New Jersey Superior Court, Appellate Division was clearly correct and there are no special and important reasons to justify further review by this Court.

A. This case presents no constitutional issue of substantial importance or any other special or important reasons requiring plenary review by this Court.

Endeavoring to characterize this case as one of major significance, petitioner refers to several cases which establish the principle that a State may not take away a driver's license without affording the motorist procedural due process. Although acknowledging that unlike the individuals in those cases he *was* afforded a full, evidentiary, pre-termination hearing within which to challenge the factual basis for the Division's action, petitioner asserts that the mere delay in bringing the matter to hearing denied him such procedural due process. At no time, however, does he refer to any case, state or federal, which establishes such a principle, and particularly under circumstances such as here, where petitioner was in no way prejudiced by the

delay in the presentation of his case.* In fact, the only case to which he refers on this precise point is a New Jersey case, *In re Arndt*, 67 N.J. 430 (1975), which is not only readily distinguishable from the instant situation but which was acknowledged by the deciding Court to rest upon principles of due process *in excess of* federal constitutional demands. *Id.* at 436.

On the other hand, both state and federal case law are replete with pronouncements that the mere occurrence of delay will not generally affect the validity of an administrative determination particularly where neither prejudice to the affected individual nor a dilatory attitude on behalf of the agency has been shown. See *In re Garber*, 141 N.J. Super. 87, 90-92 (App.Div. 1976); *In re Darcy*, 109 N.J. Super. 452, 462 (App.Div. 1971); *In re Emberton*, 109 N.J. Super. 211, 215-216 (App.Div. 1970). *See also, Wright* v. *Califano*, 587 F.2d 345 (7 Cir. 1978), failure of Social Security Administration to act upon application for increase in old age benefits from September 1, 1972 to May 13, 1975 will not justify a court in requiring that such application be granted; *E.E.O.C.* v. *Exchange Security Bank*, 529 F.2d 1214 (5 Cir. 1976), 21-month delay in issuing subpoena duces tecum followed by 18-month delay in seeking enforcement did not warrant denial of enforcement; *Chromcraft Corp.* v. *E.E.O.C.*, 465 F.2d 745 (5 Cir. 1972), more than one-year delay in serving employer with formal charges of race discrimination will not justify nullification

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* Petitioner attempts to fashion "prejudice" by highlighting the fact that had the suspension been imposed sooner, it might have coincided, or, at least, overlapped with his alleged one-year abstention from driving and/or with the period during which he was not working so that its effects would not have been felt so severely. This, however, is not the type of "prejudice" with which due process is concerned, but merely a factor to be taken into account in determining the appropriate penalty.

of such action; *United States* v. *Smith*, 443 F.2d 1278, 1280 (9 Cir. 1971), rehearing den. 451 F.2d 1027 and *United States* v. *Sundstrom*, 359 F.Supp. 1252 (S.D.N.Y. 1973), holding generally that "[i]t is not the function of this court to . . . establish arbitrary time deadlines [for administrative action] . . . . [I]n the absence of intentional delay, discriminating treatment or favoritism, the administrative action will be upheld;" and *Deloney* v. *Califano*, 488 F. Supp. 610 (N.D.Ill. 1980), long delays in processing of Social Security disability benefit claims do not violate due process; *cf.*, *Kelly* v. *Railroad Retirement Board*, 625 F.2d 486, 490-91 (3 Cir. 1980), holding unreasonable a four-year deprivation of pension benefits while awaiting an administrative determination regarding eligibility.* *And* see, *E.E.O.C.* v. *Raymond Metal Prod. Co.*, 385 F.Supp. 907, 914 (D.Md. 1974), holding that Section 706 of the federal Administrative Procedure Act, 5 U.S.C. §706, which empowers the federal courts to "compel agency action unlawfully withheld or unreasonably delayed", was "clearly intended for situations where an agency has failed to take appropriate action and not for situations . . . where the agency action has been taken in an allegedly unreasonable time."

Accordingly, the decision sought herein to be reviewed does not present a substantial federal question nor any special or important reason to justify review by this Court on writ of certiorari.

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* This case, and others like it, it is noted, are readily distinguishable from the instant one in that petitioner herein was not deprived of anything while awaiting his hearing. Rather, his driver's license remained in full force and effect during the entire duration of the administrative proceedings, a fact which indeed helps to explain why petitioner did not demand a more prompt hearing and was instead content to wait for the hearing to be scheduled.

B. The New Jersey Superior Court, Appellate Division was correct in concluding that the one-year suspension imposed by the Director of Motor Vehicles was reasonable under the facts and circumstances of this case and hence neither arbitrary nor capricious and that the delay in bringing this matter to hearing did not deny petitioner the due process of law to which he is constitutionally entitled.

Pursuant to N.J.S.A. 39:5-30 the New Jersey Director of the Division of Motor Vehicles has the power to suspend or revoke a driver's license for violation of any of the provisions of the Motor Vehicle Code. A licensee is entitled to written notice of the proposed suspension and the grounds therefor, as well as a hearing, if requested. Although the proceeding arises out of the commission of an offense punishable by the courts, it is administrative and not criminal. *Atkinson* v. *Parsekian,* 37 N.J. 143, 147, 155 (1962). Essentially, the statutory purpose is to foster safety on the highway, *Atkinson* v. *Parsekian, supra* at 155, although as was observed in *Cresse* v. *Parsekian,* 43 N.J. 326, 328-9 (1964), motor vehicle license revocations and suspensions "undoubtedly have punitive incidents, as well as deterrent effects which also serve to protect the public."

The Director has chosen to exercise such authority in all cases where a full and adequate investigation has shown that the violation(s) proximately caused a motor vehicle accident in which a person was killed. This investigation is performed by a special (Fatal Accident Investigation) unit of the New Jersey State Police, whose report is reviewed by a Fatal Accident Review Board comprised of both civilian and enforcement personnel, and forwarded to the Director with the Board's findings and recommendation.

In the instant matter, it is clear, and virtually conceded, that petitioner did violate several provisions of the New Jersey Motor Vehicle Code, specifically N.J.S.A. 39:4-98

(failure to drive at an appropriately reduced speed when approaching or negotiating a curve), N.J.S.A. 39:4-82 (failure to drive on the right half of the roadway) and N.J.S.A. 39:4-97 (careless driving),* and that such violations proximately caused the subject motor vehicle accident which left one young woman dead and two other persons seriously injured. That being the case, suspension of petitioner's driver's license was, as concluded by the Court below, entirely appropriate.

In exercising his discretion to determine the length of any such suspension, the Director is obligated to weigh each case individually and to consider the totality of circumstances involved, including the facts which constitute the particular violation(s); whether the motorist was willful or reckless, or merely negligent, and, if merely negligent, how negligent; how long the motorist had been driving; whether this is a first offense; whether he has been involved in any other accidents; his age and physical condition; whether there were any aggravating circumstances, such as drinking, or, whether there were extenuating circumstances. *Cresse* v. *Parsekian, supra* at 81 N.J. Super. 549. The Director's judgment in this regard is entitled to great weight "in view of the serious public concern with the critical area of the general welfare committed to his administrative purview," *Vance* v. *State,* 67 N.J. Super. 63, 67 (App.Div. 1961), and should be affirmed so long as reasonable and not arbitrary or capricious, *Cresse, supra* at 81 N.J. 548.

Applying this standard to the facts of this case, the New Jersey Superior Court, Appellate Division, correctly con-

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* Having been convicted in Municipal Court of reckless driving, petitioner's carelessness, at the very least, was conclusively established.

cluded that the Director did not abuse his discretion in setting a one-year period of suspension. Such a period of suspension is thus clearly not excessive but appears lenient in view of the extremely serious nature of petitioner's offense, which, but for fortuitous circumstances, could easily have resulted in several deaths rather than only one, coupled with the aggravating circumstances of petitioner's demonstrated recklessness, his subsequent involvement in yet another accident and his subsequent conviction of obstructing traffic in violation of N.J.S.A. 39:4-67. *See Fosgate* v. *Strelecki*, 102 N.J. Super. 435 (App.Div. 1968), aff'd. 53 N.J. 155 (1968), wherein the Court acknowleged that a one-year suspension was appropriate where a fatality was involved, even absent any such aggravating circumstances.

The one-year period of suspension, moreover, clearly reflects consideration of petitioner's uncorroborated assertion that for approximately one year following the subject accident, he voluntarily abstained from driving. Thus, it is merely noted that the Director did, in fact, *reduce* the period of suspension from that originally proposed, *i.e.*, from 18 months to one year; that even a two-year period of suspension under the grievous circumstances of this case would not have been unreasonable; and, finally, that there was ample reason in the record for the Director to have discounted petitioner's uncorroborated assertion of a one-year abstention from driving. In this latter regard, the record reflects that at no time during this alleged period of abstention did petitioner physically surrender his license; that he, in fact, *renewed* it during this period and paid the appropriate fee therefor; that during at least a portion of this period petitioner was either at the hospital or at home convalescing from his admittedly-serious injuries; that he had no demonstrated need to drive during the subject period since he was then neither working nor a student;

and that for all that is apparent in the record he may not have even owned a car or had one available for use during this period.

Regarding the delay in bringing this matter to hearing, both the Court below and the Administrative Law Judge recognized that here, unlike in *In re Arndt, supra,* the only case relied upon by petitioner in support of his position, petitioner was caused to suffer *no* actual prejudice as a result of the said delay. See *In re Garber, supra* at 90-92 and *In re Emberton, supra* at 215-16. ("Delay will not generally affect the validity of an administrative determination, particularly where no prejudice has been shown.") Thus, unlike in *Arndt,* petitioner herein was promptly notified following the Division's investigation of the subject accident of its intention to pursue suspension action against him, thereby enabling him to take any and all necessary steps to ensure an adequate presentation of his case when it was finally reached. Indeed, he took such steps and *was* able to adequately present his case, as the record well illustrates. Witnesses' recollections, moreover, again, unlike in *Arndt,* were not a problem; with one witness, in fact, because of the continued improvement in her condition following the accident, able to remember *more* on the date of the hearing than at any time previously (Aa11).

Additionally, it is but noted that at no time following the holding of the pre-hearing conference in August, 1979 did petitioner complain of the delay in the scheduling of the full hearing or bring to anyone's attention any need on his part to have the hearing conducted sooner. Thus content to sit and wait, he cannot now be heard to complain. Lastly, it is significant that the delay in this matter was clearly not an aberrant delay caused by some dereliction of administrative duty as was existent in *Arndt,* but rather a delay occasioned by a shortage of available resources to

respond adequately to a change in legislation which placed more and immediate demands upon those resources. *See* footnote at p. 4. As recognized by the Court in *Wright* v. *Califano, supra,* what would be a reasonable time within which to conduct the administrative hearing under such circumstances (even where the applicable statute demands reasonably prompt action, as it does in *Wright* [and did in *Arndt*] but does *not* here) "must be judged in a broader context" than simply counting the number of days. In defining what that broader context should be and with particular relevance to the facts of the instant case, the Court in *Wright* thus stated that:

> Since the delays complained of are systemwide and there are no allegations of bad faith, a dilatory attitude, or a lack of evenhandedness on the part of the agency, the reasonableness of the delays in terms of the legislatively imposed "reasonable dispatch" duty must be judged in the light of the resources that Congress has supplied to the agency for the exericse of its functions, as well as the impact of the delays on the applicants' interests. Since administrative efficiency is not a subject particularly suited to judicial evaluation, the courts should be reluctant to intervene in the administrative adjudication process, absent clear congressional guidelines or a threat to a constitutional interest. [*Id.* at 353-54.]

For these reasons, it is readily apparent that the decision of the Superior Court, Appellate Division was entirely proper and in accord with existing law. Furthermore, it is also apparent that this case presents no substantial federal question nor any special and important reason to justify further review on writ of certiorari. Clearly, the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

***Per Curiam* Opinion of the Superior Court of New Jersey, Appellate Division, dated October 19, 1981**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4794-80T3

WILLIAM J. HASER,

Appellant,

vs.

JOAN H. WISKOWSKI, Director of the Division of Motor Vehicles, State of New Jersey,

Respondent.

Argued October 5, 1981—Decided October 19, 1981.

Before Judges Allcorn and Francis.

On appeal from a Final Decision and Order of the Director of the Division of Motor Vehicles.

Robert B. Cherry argued the cause for appellant (Richard W. Vallario, on the brief).

Robert M. Jaworski, Deputy Attorney General, argued the cause for respondent (James R. Zazzali, Attorney General of New Jersey, attorney, and Erminie L. Conley, Assistant Attorney General, of counsel, Mr. Jaworski, on the brief).

Appendix A

PER CURIAM

The order of the Director of the Division of Motor Vehicles, suspending the driving privileges of the appellant, William J. Haser, for a period of one year, is affirmed substantially for the reasons set forth in the Initial Decision of the Administrative Law Judge dated May 11, 1981.

Affirmed.

APPENDIX B

Text of N.J.S.A. 39:5-30 as it Existed on the Date of the Subject Accident

39:5-30 Suspension or revocation of registration certificates and drivers' licenses or reciprocity privilege; written notice; summoning witnesses; failure to obey summons; penalties; witness fees; hearings under delegated authority.

Every registration certificate and every license certificate to drive motor vehicles may be suspended or revoked, and any person may be prohibited from obtaining a driver's license or a registration certificate, and the reciprocity privilege of any nonresident may be suspended or revoked by the commissioner for a violation of any of the provisions of this Title or on any other reasonable grounds, after due notice in writing of such proposed suspension, revocation or prohibition and the ground thereof.

He may also summon witnesses to appear before him at his office or at any other place he designates, to give testimony in a hearing which he holds looking toward a revocation of a license or registration certificate issued by or under his authority. The summons shall be served at least five days before the return date, either by registered mail or personal service. A person who fails to obey the summons shall be subject to a penalty not exceeding one hundred dollars ($100.00), to be recovered with costs in an action at law, prosecuted by the Attorney-General, and in addition the vehicle registration or driver's license, or both, as the case may be, shall forthwith be revoked. The fee for witnesses required to attend before the commissioner shall be one dollar ($1.00) for each day's

attendance and three cents ($0.03) for every mile of travel by the nearest generally traveled route in going to and from the place where the attendance of the witness is required. These fees shall be paid when the witness is excused from further attendance, and the disbursements made from payment of the fees shall be audited and paid in the manner provided for expenses of the department. The actual conduct of said hearing may be delegated by the commissioner to such departmental employees as he may designate, in which case the said employees shall recommend to the commissioner in writing, whether the said licenses or certificates shall or shall not be suspended or revoked.

Amended by L.1939, c. 216, p. 614, § 2, eff. July 12, 1939; L.1945, c. 256, p. 782, § 1.